NO. 19881

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD EUGENE WENZLER, JR.,

Appellant,

vs.

PETER PITCHESS, Sheriff of Los Angeles County, et al.,

Appellees.

See also Vol. 3344

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

STANLEY FLEISHMAN

Suite 700, Taft Building
1680 Vine Street
Hollywood, California 90028

Attorney for Appellant

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Attorney for Appellant

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PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

HAROLD EUGENE WENZLER, JR., the appellant above named, presents this, his Petition for Rehearing, in the above entitled cause, and, in support thereof, respectfully shows:

1. The Court, in its opinion of affirmance herein, failed to consider the scienter issue raised by appellant. As appears from the Petition for Writ of Habeas Corpus:

"(c) The trial court construed §311.2 of the California Penal Code as dispensing with proof of knowledge of obscenity and authorizing conviction solely on alleged circumstantial proof of 'contents'. In so construing the statute, the courts below arbitrarily deprived petitioner

of his liberty without due process of law and abridged the exercise of freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 205." (R. 7a) 1/

In Mishkin v. New York, 86 S.Ct. 958, Mr. Justice Brennan made plain that mere knowledge of contents of a work was insufficient to meet the constitutional requirements laid down in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 205. See 86 S.Ct. at 962, n. 5; 964-965.

The importance of this issue is attested to by the grant of writs of certiorari in the cases of Austin v. Kentucky, October Term, 1965, No. 453; and Redrup v. New York, October Term, 1965, No. 72, on April 25, 1966.

2. The Court, in its opinion of affirmance herein, failed to consider the issue presented in United States v. Klaw, et al., 350 F.2d 155 (2 Cir. 1965), raised by appellant. In his petition for a writ of habeas corpus, appellant alleged that:

"(g) (i) The State Court held that the prosecution need not prove, other than by the film itself, that the film went beyond customary limits of candor. The Court said (C. T. 159):

" 'Well, so there will not be any misunderstanding

1/ The reference "R" is to Volume I of the Transcript of Record on Appeal herein. The reference here is to page 7 of the Petition for Writ of Habeas Corpus. The particular page is unnumbered in the Record, but comes between R-7 and R-8.

and so that your record will be protected, I want to state clearly that in my opinion, the matter of contemporary standards with relation to the average man, average person, as used in the section, that is Section 311.2, or the definition section, may be determined by the Court or by the Jury without the admission of any other outside testimony, after having seen the picture or reviewed the book.' " (R. 9).

In United States v. Klaw, et al., supra, the Court held it a denial of due process of law, as well as a violation of the free speech provisions of the Constitution, to permit a jury to find a challenged work obscene without evidence that the work goes substantially beyond customary limits of candor and appeals to the prurient interest of the average person.

3. In holding that appellant's conviction should stand, notwithstanding the fact that he was tried under unconstitutional standards, the Court overlooked the case of Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644, which holds that conviction on a charge neither made, nor tried, nor submitted to the fact-finder is a clear deprivation of liberty without due process of law. It is plain that when appellant was convicted in the Municipal Court, and his conviction was affirmed in the Appellate Department, those courts failed to apply the constitutional tests required by Zeitlin v. Arnebergh, 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800; Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793; Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 205; and United

States v. Klaw, et al., 350 F. 2d 155 (2 Cir. 1965). The mere fact that this Court believes the material is "hard core pornography" is no assurance that the California courts would have come to the same conclusion. See People v. Schackman, Appellate Department, Superior Court of Los Angeles County, No. CR. A-5272 (decided December 4, 1963), unreported. As a minimum, due process of law requires that appellant be given an opportunity to be heard in the trial court on the issue of whether or not the material is "hard core pornography". Cole v. Arkansas, supra, 333 U. S. at 201. See also United States v. Grant and Wissman (9th Cir. No. 17865).

4. The Court clearly erred in finding the film to be hard core pornography. See Excellent Publications, Inc. v. United States, 309 F. 2d 362 (1 Cir. 1962); and Humor Magazine, Inc. v. United States, 311 F. 2d 576 (1 Cir. 1963). The film in question is a "nudie" type moving picture. The woman in the film does not appear with other persons; the genital areas are not exposed; there is nothing but nudity in the film; the film was not provocatively advertised and, indeed, was sold in a plain white container.

While Mr. Justice Stewart indicated in Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793, that he doubted his ability to define "hard core pornography", adding he "knew it when he saw it", in Ginzburg v. United States, 86 S. Ct. 942, 957, n. 3, he described the kind of material he had in mind.

Plainly, it is respectfully submitted, the film here does not meet Mr. Justice Stewart's definition of "hard core pornography". The Appellate Department held in People v. Schackman, supra, that

a film which depicted at least as much as was depicted in the film herein was not hard core pornography. The Appellate Department was apparently of the view that unless the film depicted "acts of sexual intercourse", or some of the other representations described by Mr. Justice Stewart, it could not be condemned as obscene, no matter how objectionable it might appear to be.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

STANLEY FLEISHMAN

Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, Stanley Fleishman, attorney for appellant, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for purposes of delay.

/s/ Stanley Fleishman

STANLEY FLEISHMAN